

(2) Any fraudulent or intentionally false entry in any record or report that is made, kept, or used to show compliance with this part.

(3) Any reproduction or alteration, for fraudulent purposes, of any report or record required to be kept by this part.

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**§ 120.105 Employees who must be tested.**

Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

- (a) Flight crewmember duties.
- (b) Flight attendant duties.
- (c) Flight instruction duties.
- (d) Aircraft dispatcher duties.
- (e) Aircraft maintenance and preventive maintenance duties.
- (f) Ground security coordinator duties.
- (g) Aviation screening duties.
- (h) Air traffic control duties.

**§ 120.107 Substances for which testing must be conducted.**

Each employer shall test each employee who performs a safety-sensitive function for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by § 120.109.

**§ 120.109 Types of drug testing required.**

Each employer shall conduct the types of testing described in this section in accordance with the procedures set forth in this subpart and the DOT “Procedures for Transportation Workplace Drug Testing Programs” (49 CFR part 40).

(a) *Pre-employment drug testing.* (1) No employer may hire any individual for a safety-sensitive function listed in

§ 120.105 unless the employer first conducts a pre-employment test and receives a verified negative drug test result for that individual.

(2) No employer may allow an individual to transfer from a nonsafety-sensitive to a safety-sensitive function unless the employer first conducts a pre-employment test and receives a verified negative drug test result for the individual.

(3) Employers must conduct another pre-employment test and receive a verified negative drug test result before hiring or transferring an individual into a safety-sensitive function if more than 180 days elapse between conducting the pre-employment test required by paragraphs (a)(1) or (2) of this section and hiring or transferring the individual into a safety-sensitive function, resulting in that individual being brought under an FAA drug testing program.

(4) If the following criteria are met, an employer is permitted to conduct a pre-employment test, and if such a test is conducted, the employer must receive a negative test result before putting the individual into a safety-sensitive function:

(i) The individual previously performed a safety-sensitive function for the employer and the employer is not required to pre-employment test the individual under paragraphs (a)(1) or (2) of this section before putting the individual to work in a safety-sensitive function;

(ii) The employer removed the individual from the employer’s random testing program conducted under this subpart for reasons other than a verified positive test result on an FAA-mandated drug test or a refusal to submit to such testing; and

(iii) The individual will be returning to the performance of a safety-sensitive function.

(5) Before hiring or transferring an individual to a safety-sensitive function, the employer must advise each individual that the individual will be required to undergo pre-employment testing in accordance with this subpart, to determine the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs

in the individual's system. The employer shall provide this same notification to each individual required by the employer to undergo pre-employment testing under paragraph (a)(4) of this section.

(b) *Random drug testing.* (1) Except as provided in paragraphs (b)(2) through (b)(4) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(2) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the statistical reports required by §120.119. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(3) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this subpart for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(4) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of this subpart for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(5) The selection of employees for random drug testing shall be made by a scientifically valid method, such as a

random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(6) As an employer, you must select and test a percentage of employees at least equal to the minimum annual percentage rate each year.

(i) As an employer, to determine whether you have met the minimum annual percentage rate, you must divide the number of random testing results for safety-sensitive employees by the average number of safety-sensitive employees eligible for random testing.

(A) To calculate whether you have met the annual minimum percentage rate, count all random positives, random negatives, and random refusals as your "random testing results."

(B) To calculate the average number of safety-sensitive employees eligible for random testing throughout the year, add the total number of safety-sensitive employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Only safety-sensitive employees are to be in an employer's random testing pool, and all safety-sensitive employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly) you do not need to compute this total number of safety-sensitive employees more than on a once per month basis.

(ii) As an employer, you may use a service agent to perform random selections for you, and your safety-sensitive employees may be part of a larger random testing pool of safety-sensitive employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only safety-sensitive employees are in the random testing pool. For example:

(A) If the service agent has your employees in a random testing pool for your company alone, you must ensure that the testing is conducted at least

at the minimum annual percentage rate under this part.

(B) If the service agent has your employees in a random testing pool combined with other FAA-regulated companies, you must ensure that the testing is conducted at least at the minimum annual percentage rate under this part.

(C) If the service agent has your employees in a random testing pool combined with other DOT-regulated companies, you must ensure that the testing is conducted at least at the highest rate required for any DOT-regulated company in the pool.

(7) Each employer shall ensure that random drug tests conducted under this subpart are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(8) Each employer shall require that each safety-sensitive employee who is notified of selection for random drug testing proceeds to the collection site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the collection site as soon as possible.

(9) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(10) If an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may—

(i) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(ii) Randomly select covered employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

(11) An employer required to conduct random drug testing under the anti-

drug rules of more than one DOT agency shall provide each such agency access to the employer's records of random drug testing, as determined to be necessary by the agency to ensure the employer's compliance with the rule.

(c) *Post-accident drug testing.* Each employer shall test each employee who performs a safety-sensitive function for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs in the employee's system if that employee's performance either contributed to an accident or can not be completely discounted as a contributing factor to the accident. The employee shall be tested as soon as possible but not later than 32 hours after the accident. The decision not to administer a test under this section must be based on a determination, using the best information available at the time of the determination, that the employee's performance could not have contributed to the accident. The employee shall submit to post-accident testing under this section.

(d) *Drug testing based on reasonable cause.* Each employer must test each employee who performs a safety-sensitive function and who is reasonably suspected of having used a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the symptoms of possible drug use, must substantiate and concur in the decision to test an employee who is reasonably suspected of drug use; except that in the case of an employer, other than a part 121 certificate holder, who employs 50 or fewer employees who perform safety-sensitive functions, one supervisor who is trained in detection of symptoms of possible drug use must substantiate the decision to test an employee who is reasonably suspected of drug use.

(e) *Return to duty drug testing.* Each employer shall ensure that before an individual is returned to duty to perform a safety-sensitive function after

refusing to submit to a drug test required by this subpart or receiving a verified positive drug test result on a test conducted under this subpart the individual shall undergo a return-to-duty drug test. No employer shall allow an individual required to undergo return-to-duty testing to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual. The test cannot occur until after the SAP has determined that the employee has successfully complied with the prescribed education and/or treatment.

(f) *Follow-up drug testing.* (1) Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired to perform or who has been returned to the performance of a safety-sensitive function after refusing to submit to a drug test required by this subpart or receiving a verified positive drug test result on a test conducted under this subpart.

(2) The number and frequency of such testing shall be determined by the employer's Substance Abuse Professional conducted in accordance with the provisions of 49 CFR part 40, but shall consist of at least six tests in the first 12 months following the employee's return to duty.

(3) The employer must direct the employee to undergo testing for alcohol in accordance with subpart F of this part, in addition to drugs, if the Substance Abuse Professional determines that alcohol testing is necessary for the particular employee. Any such alcohol testing shall be conducted in accordance with the provisions of 49 CFR part 40.

(4) Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The Substance Abuse Professional may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the Substance Abuse Professional determines that such testing is no longer necessary.

**§ 120.111 Administrative and other matters.**

(a) *MRO record retention requirements.*

(1) Records concerning drug tests confirmed positive by the laboratory shall be maintained by the MRO for 5 years. Such records include the MRO copies of the custody and control form, medical interviews, documentation of the basis for verifying as negative test results confirmed as positive by the laboratory, any other documentation concerning the MRO's verification process.

(2) Should the employer change MRO's for any reason, the employer shall ensure that the former MRO forwards all records maintained pursuant to this rule to the new MRO within ten working days of receiving notice from the employer of the new MRO's name and address.

(3) Any employer obtaining MRO services by contract, including a contract through a C/TPA, shall ensure that the contract includes a record-keeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

(b) *Access to records.* The employer and the MRO shall permit the Administrator or the Administrator's representative to examine records required to be kept under this subpart and 49 CFR part 40. The Administrator or the Administrator's representative may require that all records maintained by the service agent for the employer must be produced at the employer's place of business.

(c) *Release of drug testing information.* An employer shall release information regarding an employee's drug testing results, evaluation, or rehabilitation to a third party in accordance with 49 CFR part 40. Except as required by law, this subpart, or 49 CFR part 40, no employer shall release employee information.

(d) *Refusal to submit to testing.* Each employer must notify the FAA within 2 working days of any employee who holds a certificate issued under part 61, part 63, or part 65 of this chapter who has refused to submit to a drug test required under this subpart. Notification must be sent to: Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM–